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No. 470

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

THE NORTHERN PACIFIC RAILWAY COMPANY ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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Appellants' opening brief dealt only with the one ground upon which the lower court enjoined the Commission's order of December 1, 1931, viz., that the denial of the carriers' petition for rehearing to show changed conditions was arbitrary and deprived them of a fair hearing. (R. 295.) We still believe that is the only question in the case. However, appellees in their brief have argued other points in support of the decree below, and as the

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decision of this court in *United States* v. *American Railway Express Company,* 265 U. S. 425, 435–436, indicates that this is proper, even though no cross-appeal is taken, appellants desire here to answer additional grounds of invalidity urged by appellees, all of which were found by the court below to be without merit. (R. 277–284.)

I

The claim is made that the order of December 1, 1931, is void because its effect is to reduce rates previously declared reasonable by the Commission, not because such rates were unreasonable in and of themselves and based upon the service rendered, but to bring about harmonious relationships between such rates and rates not in issue to other destinations; (R. 13) in other words, that the Commission's finding of unreasonableness was one of "relative" unreasonableness, and not one of "inherent" unreasonableness.

The fact that the Commission had in an earlier decision prescribed a basis of rates as reasonable is not tantamount to an estoppel. The Commission has the power and the duty to modify previous orders, if new evidence warrants the change. A rate order is not *res judicata;* every rate order may be superseded by another. *Tagg Bros.* v. *United States,* 280 U. S. 420, 445. The evidence that was before the Commission is not before the court, and in its absence it is respectfully suggested that there is a conclusive presumption that the new evidence

warranted the new order. (Compare *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 116; *Spiller* v. *Atchison, T. & S. Fe Ry. Co.,* 253 U. S. 117, 125; *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U. S. 287, 295; *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318, 323–324.)

The first decision of the Commission dealing with either Docket 17304 or 21737 (which are the consolidated cases before this court) was its second supplemental report in *Midcontinent Oil Rates, 1925,* decided March 5, 1928. (R. 75–87.) Therein the Commission found that the rates from Group 3 points to destinations in South Dakota, North Dakota and northwestern Minnesota were unreasonable as well as unduly prejudicial. Specifically, its finding was:

> 1. That the rates on gasoline and other petroleum products taking the same rates from Group 3, as that group is defined in our original report herein, to points in South Dakota, North Dakota, and that part of Minnesota covered by these proceedings, are and for the future will be unreasonable and unduly prejudicial to the extent that they exceed the respective rates set forth in Appendixes A and C under the heading "Rate prescribed." (R. 85.)

It is also true that in its decision the Commission directed the carriers to adjust their rates to other destinations "in proper relationship thereto, having due regard for differences in distances". (R. 86.) It seems clear that this decision was not

simply to "harmonize" the rates from Group 3 points to destinations in North Dakota, South Dakota and northwestern Minnesota with the reduced rates prescribed by the Commission's earlier decision of May 10, 1926 (R. 19) to Sioux City, Sioux Falls, St. Paul and Duluth and intermediate points, but that the Commission also found the old rates unreasonable and required changes therein. Its finding in the report directly before the court for review, that of December 1, 1931, (embracing also Docket 21737, R. 120) was an equally clear finding of unreasonableness. That finding reads:

> Upon the whole record now before us, we find that the rates assailed prior to June 14, 1928, were not unreasonable; that those applicable on and after that date until the effective date of our present order for the future were unreasonable only in the instances and to the extent they exceeded the rates shown from Group 3 in column H of Appendix B hereto, plus or minus the differentials from other origin groups applicable to Willmar and St. Paul, Minn.; *and that on and after the effective date of our order for the future, the rates assailed will be unreasonable to the extent they exceed or may exceed those shown from Group 3 in column F of Appendix B, plus or minus said differentials from the other origin groups.* Our previous findings are modified accordingly. (Italics supplied.) (R. 129.)

The order, requiring the reduced rates to be established on or before March 15, 1932, (R. 145) is

to be read in connection with the accompanying report (*Georgia Commission* v. *United States,* 283 U. S. 765, 771.) The recitals in the report clearly show the Commission dealt with the inherent unreasonableness of the rates, for it discusses ton-mile and car-mile earnings, (R. 124–125); the routes of movement of the traffic, (R. 123); evidence showing traffic density figures and other statistical data reflecting conditions surrounding the transportation of the traffic, (R. 126), and the unreasonableness of the assailed rates as compared with numerous other rates, including rates previously prescribed by the Commission as reasonable from the same general producing areas to the same general destination territory, together with their resulting revenues. (R. 124–127.) Had the Commission based its finding of unreasonableness entirely upon comparisons with other rates, decisions of this court sustain such a finding. (*Louisville & N. R. Co.* v. *United States,* 238 U. S. 1, 12; *Western Paper Makers' Chemical Company* v. *United States,* 271 U. S. 268, 271.)

In overruling the appellees' contention upon this point, the lower court said:

> * * * What we are asked to do is to find from the language of the report that the commission entirely disregarded the reasonableness of the rates as such and proceeded upon the theory that it might arbitrarily relate these rates to other rates, although it knew the latter to be less than

those which might reasonably be charged for the service rendered. We do not think that we would be justified in so finding. The issue as to whether these rates were reasonable was squarely before the commission. In determining that question it had the right to compare the rates assailed with other rates which in its judgment formed a proper basis of comparison. (Id. 281–282.)

* * * * *

Whether a rate is voluntarily established by a carrier or prescribed by the commission, if in the judgment of the commission it represents all that may reasonably be charged for the service performed, there would seem to be no logic in holding that it would not constitute some evidence of what might properly be charged for a similar service under similar conditions. (R. 283.)

II

Another claim is that the order is void because in prescribing the reduced rates, the Commission considered the relationship only of such reduced rates to rates not in issue from the Midcontinent field to South Dakota and the gateways on the eastern border of the destination territory, and arbitrarily refused to consider the relationships between the rates in issue and the comparative rates from Casper, Wyo., on the ground that these relationships had not been brought into the case by the complainants. (R. 13–14.)

An examination of the report will show that the rates to South Dakota and to the gateways on the eastern border of destination territory were constantly before the Commission. The complainants in Docket No. 16309, which had been consolidated with No. 17304 (one of the cases here under review) alleged that the rates on petroleum and its products from points in Missouri, Kansas, Arkansas, Oklahoma, Indiana, Illinois, Wisconsin, Montana, and Wyoming to destinations in South Dakota are unjust and unreasonable, and unduly prejudicial as compared with relatively lower rates from the same points of origin to destinations in Iowa, Minnesota, and Nebraska, and in South Dakota on the line of the Chicago, Milwaukee & St. Paul from Sioux City, Iowa, to and including Sioux Falls, S. Dak. (R. 76.)

These consolidated cases were disposed of in the Commission's Second Supplemental Report in *Midcontinent Oil Rates,* 1925, decided March 5, 1928. (R. 75.) The South Dakota rates are fully discussed therein. (R. 77–83.) In the report of December 1, 1931, the South Dakota rates were again discussed, the Commission saying:

> In our former report we also prescribed maximum reasonable rates from the midcontinental field to a number of points in adjacent territory in South Dakota reached by the lines of two of the principal defendants operating in the destination territory. The latter are relatively higher, particularly

> those to points west of the Missouri River, than the rates to Sioux City, Willmar, St. Paul, and the other gateways. In Appendix A hereto the rates and short-line distances to those gateways and to representative points in the destination territory are compared with the rates prescribed to the South Dakota points, using the first-class rates under the southwestern scale as a basis of comparison. The percentages of the scale rates indicate the respective levels of the rates on petroleum. The points in italics are representative of those to which defendants published rates in purported compliance with our instruction in the former report to adjust the rates to other points in proper relationship with those specifically prescribed to the key points. These rates became effective June 14, 1928. (R. 122–123.)

The December 1, 1931, report shows complainants in the Commission proceedings contended that the *1925 Midcontinent Oil Rates case* (R. 75) resulted in rates unjustifiably high, "particularly as compared with the rates prescribed from the same origins to points in South Dakota and to St. Paul, Paynesville, St. Cloud, Willmar, and Granite Falls, Minn." (R. 123). In answer to the contention of the Standard Oil Company (Indiana) that the relationship of the rates assailed to those from Casper, Wyo., should be considered in this proceeding, the Commission held that as such relationship had not been "brought in issue by the complaints",

they "will not be considered". (R. 121.) This holding was clearly right; otherwise the order would be attacked as having denied a full opportunity to be heard because the issues were broader than the complaints. Appellees' argument was overruled by the lower court in this language:

> It seems quite evident from the language of the report that the complainants before the commission urged the propriety of taking the South Dakota rates as a basis of comparison, while the railroads claimed that such rates afforded an improper basis because they were too low and for other reasons. It must, we think, be assumed, in the absence of the record upon which the report was based, that the commission was justified in reaching the conclusion which it evidently did reach, that the South Dakota rates, at the time of the hearing, represented reasonable maxima, and that they did therefore furnish a proper basis for determining the reasonableness of the rates assailed.
>
> The dissenting opinion of Commissioner Mahaffie indicates that in his opinion the report of the majority of the commissioners resulted from relating the assailed rates to the South Dakota rates which he considered too low to furnish a proper basis of comparison. * * *.
>
> It is true, as pointed out by the petitioners, that the commission had previously said that the rates to South Dakota were below reasonable maxima. That, however, would not foreclose the commission, at a later time,

from changing its mind and reaching another conclusion upon a different record. (R. 281.)

III

The last contention to be discussed is that the Commission's method of conducting the proceedings was arbitrary in that it denied various petitions made by the carriers for consolidation and further hearing upon a single record of all cases relating to the general level of the rates from the Midcontinent field to destinations in Western Trunk Line Territory, other than the destination territory involved herein. (R. 10–11.) The nature of the petitions for rehearing, consolidation, etc., is shown clearly in the lower court's opinion, and the basis for the present argument stated as follows:

> * * * This contention is based principally on the denial by the commission of the various petitions and requests by the carriers, namely, the petition to postpone the effective date of the order of March 5, 1928, and to reopen Midcontinent Oil Rates, 1925; to grant a further hearing upon a single record with respect to the level of rates from midcontinent field to destinations in Nebraska, Iowa, North Dakota, South Dakota, and Minnesota, denied by the order of February 11, 1929; the request that the hearing in Number 17304 set for Fargo on January 13, 1930, be postponed in order that

> that proceeding might be consolidated with the pending complaints attacking the relationships between the rates from the midcontinent field and the rates from Wyoming; the petition of January 3, 1930, asking for such consolidation and for the postponement of a hearing in Number 17304; the petition of January 14, 1930, to reopen Midcontinent Oil Rates, 1925, for further hearing with respect to rates prescribed from the midcontinent field to Lincoln and Omaha, Nebraska; Des Moines, Fort Dodge, Sioux City, and Mason City, Iowa; Sioux Falls, South Dakota; and St. Paul and Duluth, Minnesota; and to territory beyond such gateway points, and to consolidate with said proceeding the Wyoming complaints; the petition of February 3, 1932, to set aside or stay the effect of the order of December 1, 1931, and to grant a rehearing on account of changed conditions. (R. 278.)

With the exception of the holding that the Commission had erred in denying the carriers' petition for rehearing of February 3, 1932, to show changed conditions, because of which the order was enjoined, (R. 295) a proposition discussed by appellants in their original briefs, the lower court overruled the argument in the following language:

> We think that the refusal of the commission to combine with the proceeding challenging the reasonableness of the rates in North Dakota and northwestern Minnesota

> other proceedings relating to similar rates to other points in western trunk line territory was not so unreasonable as to justify the setting aside of the order complained of, and was within the discretion of the commission. The hearing with respect to the rates assailed might have shown that they were, in comparison with other rates, too high, or that the other rates were too low. If the commission reached the conclusion that the rates assailed were not too high, that would have ended the controversy. If it found them out of line with other rates which it considered reasonable, it could reduce them without disturbing the other rates. It had before it the complaints of certain shippers as to certain rates in a certain territory, and the carriers, we think, had no absolute right to require that other controversies affecting other shippers and other territories be injected. The denials by the commission of the petitions for consolidation were, we think, within its discretion. (R. 284.)

The only serious question in the case, as the District Court found, was whether the decision of this court in the *Grain case,* 284 U. S. 248, was controlling. (R. 284.) We have fully covered this question in our original brief, to which we refer the court.

It is respectfully insisted that the decree of the lower court should be vacated and the Commission's order reinstated.

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